A Publication of
Montana Legislative Council

THE INTERIM

AUGUST 1996 HELENA, MONTANA VOL. X NO. 15

COMMITTEE ON STATE MANAGEMENT SYSTEMS

Committee to Meet in August...The Committee on State Management Systems is scheduled to meet on Friday, August 23, beginning at 9 a.m. in Room 104 of the Capitol. The focus of the meeting will be to review and act upon the recommendations of the three subcommittees commissioned by the Committee--the Accounting Task Force, the Budgeting Task Force, and the Data Management Task Force. The recommendations of the Task Forces are available for review at the Legislative Services Division. The tentative recommendations include two draft bills, one revising current law on budgeting and another creating an intergovernmental advisory council on information technology.

For more information about the Committee or the August 23 meeting, please contact Dave Bohyer at the Legislative Services Division, 444-3064.

JUVENILE JUSTICE AND MENTAL HEALTH STUDY COMMISSION

Commission Holds Sixth Meeting...The Juvenile Justice and Mental Health Study Commission held its sixth meeting in Missoula on July 10-12. Proposals from the Commission's subcommittees were heard by the full Commission. The proposals were refined, and further information needs were identified. The tentative proposals are to:

- support the Department of Public Health and Human Services' proposal to increase chemical dependency funding for adolescents by $200,000 each fiscal year of the 1999 biennium;

- recommend that the state provide long-term secure care for chronic severely emotionally disturbed youth;

- recommend that the state provide a continuum of care for treatment of youth who are adjudicated sex offenders and to recommend that Pine Hills School be a potential place for treatment within the continuum of care, when appropriate, and that the sex offender population be placed under a separate population cap in order to allow treatment to be completed;

- make a recommendation regarding a mental health treatment continuum of care;

- support an Office of Public Instruction proposal to allocate a small portion of the state's share of direct state aid to provide schools with resources to address conduct-disordered pupils in public school classrooms;

- recommend that special education funding and other education funding follow an out-of-district student and be allowed to be used for specific costs incurred by the district;

- recommend that school records, including the cumulative file and special education records, along with the original immunization records, be transferred to the receiving school within 5 days of request;

- make recommendations regarding schools and information sharing with state and county agencies through interagency agreements, use of existing teams, and computer data bases;

- recommend judicial pilot projects for families involved in the Youth Court and other human services to provide: a single point-of-entry; juvenile assessment centers; family assessment coordination teams; and court magistrates, special masters, or research assistants to assist District Court Judges;

- recommend that habitual truancy and ungovernability be treated as misdemeanor crimes in Justices', Municipal, and City Courts with concurrent jurisdiction with the Youth Court;

- recommend elimination of "youth in need of supervision", removal of status offenders (truancy, ungovernability) from the Youth Court

Act, a single petition for delinquent youth, and increased penalties for violation of formal consent decrees;

- recommend that the County Attorney be allowed to file for leave to file information directly in District Court for serious offenses;
- recommend limiting the use of an informal consent adjustment and a formal consent decree for the equivalent of a single felony for each;
- recommend increasing the time for short-term detention from 96 hours to 10 working days;
- recommend that detention be allowed for up to 10 days for formal consent decrees and for up to 3 days for informal consent adjustments; and
- make recommendations on other detention alternatives, detention reimbursement, and Youth Court funding.

To Hold Final Meeting in Helena...The Commission will hold its final meeting in Helena on September 9 and 10. The agenda has not been set, but tentatively, the Commission will hear from students and the public on the proposals on September 9. On September 10, the Commission will discuss and take executive action on the proposals.

A more detailed summary of the proposals will be mailed to those on the interested persons list prior to the meeting. The final recommendations will be presented to the 55th Legislature, and a final report will be available in November 1996.

For more information, contact Susan Fox at the Legislative Services Division, 444-3064

SUBCOMMITTEE ON VETERANS' NEEDS

To Hold Final Meeting...The final meeting of the Subcommittee on Veterans' Needs will be held on August 6 in Room 104 of the Capitol. The meeting will begin at 9 a.m. There will be a public hearing on the proposals before the Committee, after which the Committee will take final action. The proposals include:

- a site selection process for an eastern Montana State Veterans' Cemetery (requires legislation);
- a National Guard scholarship program (requires legislation);

- a fee waiver at the Montana University System for survivors of a Guard member killed while on state active duty (requires legislation);
- changes to the veterans' preference law (requires legislation); and
- a subsidy for the Eastern Montana Veterans' Home.

For copies of the proposed legislation or for more information, contact Susan Fox at the Legislative Services Division, 444-3064.

SUBCOMMITTEE ON THE FOREIGN INVESTMENT DEPOSITORY

Subcommittee to Hold Final Meeting...The final meeting of the Subcommittee on the Foreign Investment Depository is scheduled for Wednesday, September 11, in Room 437 of the Capitol. The meeting will begin at 1 p.m. and continue to 5 p.m. An after dinner session on Wednesday and a continuation of the meeting on Thursday, September 12, is contingent on the scope of the meeting and the decision of the members.

The focus of the meeting will be a comprehensive draft bill that would enable the state to charter and regulate nonbank depositories to serve exclusively foreign clients. Public testimony will be welcomed. Copies of the draft will be available to interested persons in mid-August.

For additional information, please contact Stephen Maly at the Legislative Services Division, 444-3064.

LEGISLATIVE FINANCE COMMITTEE

Committee Meets in June...The Legislative Finance Committee (LFC) met in Helena on June 13 and 14 to hear a number of reports and discuss several issues.

Committee Discusses Budget Process...The Committee held an open forum to discuss the legislative budget process. A number of legislators, in addition to Committee members, joined the discussion on possible changes or improvements to the existing process. The session included comments on the budget development methodology, budget analysis

procedures, budget data presented to the Legislature, and the legislative process. The Committee took the following actions:

- requested a Committee bill draft that would require agencies to submit a prioritized list of functions and services that would be eliminated if the base budget were trimmed to a certain percentage below the base;

- encouraged the LFA to include in subcommittee notebooks, when feasible, a summary of applicable audit reports, reports by interim committees, and appropriation subcommittee recommendations;

- requested the LFA to show as part of the budget analysis the difference between the amounts appropriated by the Legislature and the actual spending patterns for each program, to the extent feasible;

- requested the LFA to prepare pamphlets for the session that summarize both the budget process/terminology and key budget data, to the extent possible within existing resources;

- elected to hold a meeting of the LFC this fall to recommend appropriations process "ground rules" that would go to the Appropriations Committee when the session starts. The LFC also requested the drafting of an amendment to the joint rules to incorporate this process into session procedure.

- directed that a pilot project be established in the 1997 session for appeal of fiscal notes, to be reviewed by the LFA. A draft amendment to the joint rules is to be prepared to incorporate this process into session procedure.

In addition, the LFA outlined plans to focus the budget analysis more on program review of issues and less on present law analysis. Further, the LFD will prepare more fiscal and budget briefings and training sessions for legislators, particularly new members.

Committee Recommends Changes to Appropriation Statutes...The LFC requested the drafting of a Committee bill for legislation amending appropriation statutes. The thrust of the bill is amendments made to 17-8-101. These amendments put more funds under legislative appropriation control. These funds are tax revenue distributed to local governments, enterprise funds, and debt service funds. Due to recent constitutional changes, pension funds are moved out of the treasury. They are not subject to appropriations.

The bill makes clear that insurance premium taxes and motor vehicle registration fees are deposited in the general fund. Payments to pension

funds from these revenue sources are now made from the general fund. There is no general fund impact.

The bill also makes changes to statutory appropriation authority for certain funds, limits pension administrative costs to 1.5% of benefit payments, and restructures appropriations statutes to provide clarity and simplification.

Subcommittee Recommendations for Legislation Accepted...The LFC requested a draft Committee bill to incorporate the Senate Bill 378 Subcommittee's recommendations for draft legislation concerning statutory appropriations. The recommendations include clarifying beer taxes by combining them all into one tax and into one MCA section and eliminating 29 statutory appropriations.

Hears Budget Amendment Requests....The LFC was presented with a report on budget amendment requests increasing fiscal 1995 appropriations by $1.3 million. The Office of Budget and Program Planning had approved budget amendment increases for $2.6 million and 11.02 FTE in fiscal 1996 and 0.50 FTE in fiscal 1997. To date in this biennium, approved budget amendments total $19 million and 30.07 FTE.

Committee Considers Supplemental Appropriations...The LFC found that the general fund transfer of $1,168,954 from fiscal 1997 to fiscal 1996 to pay fire suppression costs in the Department of Natural Resources and Conservation met statutory requirements.

The Department of Corrections (DOC) requested a general fund supplemental transfer of $3.3 million from the fiscal 1997 general fund appropriation to fiscal 1996. The need for this supplemental, as presented by DOC, was in the following areas of the juvenile corrections program;

- Montana Youth Alternatives (MYA), $0.3 million: The total fiscal 1996 budget for the MYA program is $2,162,240, with $1,162,240 being from the general fund. DOC is projecting a general fund deficit of $653,279 for the fiscal year.

- Secure care females, $0.6 million: As of May 16, 1996, 25 females have been placed in secure care facilities (a maximum of 10 was originally projected in testimony to the appropriation subcommittee). DOC projects total expenditures of $706,953, an average cost of approximately $28,278 per secure care placement.

- Sex offender treatment, $1.4 million: According to DOC, 63 sex offender placements have been made this fiscal year, at a total cost projected to be $1,700,217. The average cost per placement is $26,988. Due to lack of available historical data,

LFA staff was not able to ascertain whether the increased cost of sex offender treatment is due to: (1) an actual increase in the number of offenders being treated; (2) an increase in the average length of treatment; (3) an increase in the cost per offender treated; and/or (4) a combination of the three.

- Increased number of placements and longer average length of stay, $0.5 million: According to DOC, the average length of stay in custody of youth in the juvenile corrections program has increased from approximately 110 days in fiscal 1994 to 186 days in fiscal 1996 (a 60% increase). DOC is not able to identify why this is happening other than to speculate that more and more serious crimes are being committed by youth and District Court Judges are imposing harsher sentences. DOC was not able to provide the increase in the total number of youth in the juvenile corrections program over fiscal 1994.

- Loss of federal emergency Title IV-A funds, $0.5 million: Effective December 31, 1995, federal Title IV-A (emergency assistance) funds may no longer be used for juvenile corrections services. According to DOC officials, the impact of this directive resulted in a loss of available federal funds for juvenile corrections of $503,468.

The LFC voted to send a letter to the Governor stating that the supplemental request does not appear to meet statutory requirements because the required plan specifying how the Department will then stay within its 1997 biennium appropriation is not clear. The Governor subsequently responded that he considered the Department to be in compliance with statutory criteria and authorized the supplemental transfer.

Committee Adopts Budget Comparisons Methodology...The LFC adopted a method of budget comparisons as a standard for making comparisons of budget trends from biennium to biennium. Confusion in the last session due to different estimating procedures and measurement goals resulted in a need to develop a common methodology. The Committee agreed to measure total state spending for comparison purposes and identified which budget components should be included in the comparison. The Committee also requested a Committee bill draft to make the comparison methodology a statutory requirement.

SB 378 Subcommittee Meets...The Senate Bill 378 Subcommittee of the Legislative Finance Committee met June 12 and made the following recommendations:

Statutory Appropriations:

- not to add statutory appropriations for bond forfeitures or EIS fees; and

- to add statutory guidelines for statutory appropriations to facilitate the biennial review process and to guide the Legislature when considering new ones.

State Special Revenue Accounts:

- eliminate the public campaign fund account and transfer the fund to the general fund;
- exempt from future subcommittee reviews only those accounts specifically set up for private funds;
- de-earmark the cigarette tax, which is deposited in the cigarette tax revenue account;
- de-earmark the handicapped telecommunications tax, which is deposited in the handicapped telecommunications account; and
- de-earmark forestry fire protection taxes.

To Meet in August...The Subcommittee will meet August 16 at 8 a.m. in Room 108 of the Capitol to:

- adopt proposed guidelines for statutory appropriations;
- consider clarifying the use of the word "appropriate" in statute;
- hear a discussion by the Department of Fish, Wildlife, and Parks on federal restrictions on diverting state hunting and fishing license money;
- revisit two accounts with possible high fund balances (junk vehicle account and the water right appropriation account);
- review the remaining state special revenue accounts for possible de-earmarking to the general fund; and
- consider de-earmarking long-range building debt service account revenue sources and depositing them in the general fund.

POSTSECONDARY EDUCATION POLICY AND BUDGET COMMITTEE

PEPB Committee Meets...At its June 24 meeting, the Postsecondary Education Policy and Budget Committee (PEPB) heard reports, discussed policy issues developed at the Yellow Bay legislative retreat on May 4 and 5, and began action to determine which higher education policies

would be included in the Committee recommendations to the 1997 Legislature.

Committee Hears Reports on Enrollment, Reversions, and Tuition...Sandy Whitney, Legislative Fiscal Division, presented reports documenting that the University System enrollment is 372 resident FTE fewer than anticipated, resulting in estimated general fund reversions of over $600,000 for fiscal 1996, and that enrollment trends through fiscal 1996 do not indicate that tuition increases to date have resulted in unusual enrollment changes.

Committee Discusses Accountability Measures...As directed by the PEPB on April 15, Sandy Whitney provided a report on accountability measures that could be used to document progress in emphasizing 2-year education, implementing the core credit transfer policy, and improving the application process. Dr. Dick Crofts, Commissioner of Higher Education, then followed with a report detailing the specific actions considered by the University System to emphasize 2-year education, including expanding the role and scope, providing policies to support the expansion of 2-year education, and reviewing programs in the community colleges and the colleges of technology.

Committee Discusses Yellow Bay Issues...Senator Greg Jergeson, Regent Jim Kaze, and Dr. Crofts led discussions on three issues developed at Yellow Bay, which had not been previously discussed by the PEPB: communications among parties concerned about higher education, public/private partnerships, and information technology.

Committee Makes Recommendations...The "Issues Paper" is a summary of issues considered through April 1996. The PEPB began executive action on those issues, deciding to:

- ask the Board of Regents to explore user fees for research station and extension services;
- recommend continuation of nonbeneficiary support to Indian colleges begun by the 1995 Legislature; and
- recommend emphasis on undergraduate education through:
    a. expanded academic and support functions;
    b. planning to raise nonresident tuition and limit nonresident FTE to those who can be accommodated after residents are served;
    c. planning greater use of telecommunications, nontraditional class times, and limited choices so that more students may be served at a lower cost;

d. concentrating 2- and 4-year efforts toward workforce preparation by designing programs to reflect the "multiple entry, multiple exit" strategy, including allowing more students to start in a 2-year program and transfer to a 4-year program;
e. encouraging more high school graduates to enroll in 2-year education programs, perhaps after having begun them while still in high school; and
f. counseling, advising, and providing information to encourage students to begin enrolling in the most appropriate program.

Committee to Meet in September...The PEPB decided that the next meeting will be September 9 at 9 a.m. in Room 104 of the Capitol. The agenda may include: continued executive action on the "Issues Paper", executive action on issues presented at the June meeting, a report on the feasibility of charging fees for research station and extension services, and consideration of draft legislation that could be presented to the 1997 Legislature.

REVENUE OVERSIGHT COMMITTEE

Committee Reviews Options to Revise Taxation of Passenger Vehicles...Last fall, the Revenue Oversight Committee decided that motor vehicle taxation, including taxation of passenger vehicles and heavy trucks, should be one of its policy priorities. In early January 1996, Committee staff asked several individuals and motor vehicle associations to assist the Revenue Oversight Committee in its consideration of motor vehicle taxation. This "motor vehicle taxation group" includes employees of the Departments of Revenue, Justice, and Transportation, as well as a representative from the Montana Automobile Dealers Association and representatives of the trucking industry. The group is informally divided into a project team and an advisory group. The project team is involved in data collection and analysis and, in conjunction with the advisory group, the development of policy options for presentation to the Revenue Oversight Committee.

The advisory group and the project team have met several times since January. There is general consensus that House Bill No. 363, considered during the 1995 legislative session, would be a good starting point for analysis. The bill would have taxed all motor vehicles for property tax purposes at 2% of the depreciated value of the manufacturer's suggested retail price (MSRP) and would have clarified that the new car sales tax would be imposed on the MSRP. The MSRP is

based upon standard equipment on a vehicle and does not contain price additions or deductions for optional accessories. The bill stalled in the Senate Taxation Committee because of the general perception that taxpayers had not been involved in the formulation of the revisions.

To date, the project team has been working on the analysis of various options regarding the taxation of passenger vehicles under the House Bill No. 363 model. Work had been delayed on the analysis of heavy trucks because of the difficulty in obtaining a data base for interstate trucks. That data is now available.

At the Revenue Oversight Committee's June 24 meeting, Jeff Martin, Committee staff, presented a report that described several options for revising the taxation of passenger vehicles. Each option would tax passenger vehicles at 2% of the depreciated value of the MSRP. Data for the report was compiled by Larry Finch, Program Manager, Office of Research and Information, Department of Revenue. The report included information on the shift in tax burden for passenger cars, light pickups, vans, and "sport utility" vehicles.

The guiding assumption for the analysis was that revenue neutrality should be maintained with respect to total taxes. Under each option, the new car sales tax would fall by about $558,000, while the locally imposed motor vehicle tax would increase by a like amount statewide. Under current law, passenger vehicles are valued by using the National Automobile Dealers Association used car guides. Under this method, passenger cars tend to lose value faster than other types of vehicles, particularly pickups and sport utility vehicles. By applying the same depreciation schedule to each type of vehicle, the tax burden for cars increases while the tax burden decreases or remains the same for other types of vehicles. The shift in tax burden to cars would be mitigated under an option that would use a separate depreciation schedule for pickups. The analysis also showed the revenue impact to local governments under each option. Revenue gains or losses to local governments would depend on the distribution by vehicle type and age.

The Committee expressed concern about the shift in tax burden to passenger cars. Mr. Martin told the Committee that the shift was due mainly to the assumption relating to revenue neutrality with respect to total taxes, including the new car sales tax. Because the new car sales tax and the motor vehicle tax are two separate taxes, a better approach would be to devise an option that is revenue neutral with respect to local taxes. The project group has since devised an option that would satisfy that criterion. That option would include separate depreciation schedules for each type of vehicle. Under that option, there would be no shift in tax burden by type or age of vehicle and virtually no change in tax collections at the local level. This option will be presented to the Committee at its next meeting. Options for the taxation of heavy trucks will also be presented.

Challenge to Montana's Property Reappraisal System...In 1993, taxpayers in 17 Montana counties filed a lawsuit against the Department of Revenue (*Albright v. Montana Department of Revenue*) challenging the constitutionality of the state's property reappraisal system for residential and commercial (class four) property. On May 31, 1996, District Court Judge Marge Johnson, Cascade County, certified *Albright* as a class action suit. The court restricted the class to "those Class Four property taxpayers statewide against whose property increased property taxes were assessed as a result of the 1993 reappraisal". Prior to the ruling, Larry Schuster, representing the plaintiffs, had sent a letter to the counties requesting that a certain percentage of the second half property tax payments for class four property be deposited in a protested tax account.

Dave Woodgerd, Chief Legal Counsel, Department of Revenue, told the Committee that the Department has appealed the class action designation to the Montana Supreme Court. In 1995, the Legislature enacted Senate Bill No. 393 (Ch. 348, L. 1995), which requires a taxpayer to pay taxes under protest if the taxpayer wants to be a member of the class. According to Woodgerd, allowing the attorney to file a blanket protest on behalf of the class is contrary to state law. The Department has also asked the Supreme Court to take original jurisdiction of the entire case. The court has agreed to take jurisdiction on the class action issues, but has not yet decided whether to assume jurisdiction of the entire case.

Rail Car Tax Settlement Off...Pens had been poised to sign a tax settlement between the Department of Revenue and several rail car companies operating within the state. The settlement agreement would have resolved litigation that has been in federal court since 1992 when Montana revised the laws relating to the taxation of rail cars. During the July 1992 Special Session, the Legislature replaced the freight line license tax with a statewide property tax on rail cars (Ch. 10, Sp. L. July 1992). The rail car companies sued the state in federal court, claiming that the new tax scheme violated federal prohibitions against discriminatory taxation under the Railroad Revitalization and Regulatory Reform Act (4-R Act). The rail car companies have been paying the tax under protest since enactment of the tax. Under the agreement, the rail car companies would have received a refund of retroactive taxes paid for tax years 1991 and 1992, while the state would have received $4.8 million, plus accumulated interest, for taxes paid under protest in tax years 1993 through 1995. The agreement also established the method of valuation of rail cars and tax rates through tax year 2002 (for prior coverage, see the May 1996 **INTERIM**).

The Department withdrew from the settlement following the U.S. Supreme Court decision in *Seminole Tribe of Florida v. Florida*. The decision addressed the issue of whether an Indian tribe may sue a state in federal court to enforce certain provisions of the Indian Gaming Regulatory Act. The Supreme Court held that the 11th amendment to the U.S. Constitution bars Indian tribes from suing states in federal court. The

decision, however, went beyond the narrow issue of Indian gaming by barring suits against states on other federal laws (the "Back Page" in this edition of **THE INTERIM** discusses some of the broader implications of *Seminole*). Dave Woodgerd informed the Committee that the Department filed motions in federal court to dismiss the entire case because of lack of jurisdiction. However, Federal District Court Judge Shanstrom has orally denied the motion to dismiss on the grounds that the state had implicitly waived its 11th amendment immunity by agreeing to the settlement. The Department is waiting for the formal court order before deciding whether to appeal the decision.

Committee Requests Bill Draft on Tax Settlements...At the March 29 Committee meeting, Greg Petesch, Director, Legal Services Office, Legislative Services Division, reviewed the rail car settlement and identified three issues that the Committee should consider:

- the authority of the Department to bind the state for future tax years;
- the authority of the Department to negotiate a tax rate; and
- the general authority of the Department to enter into negotiated settlements under 15-1-122, MCA, even when the tax is not disputed.

Under current law, the Department of Revenue has the authority to enter into prospective tax settlements as evidenced by the rail car settlement. In a report presented to the Committee on June 24, Committee staff noted that the Legislature should be concerned about Executive Branch abrogation of legislative authority regardless of the issue. Staff also recommended that the Committee revisit 15-1-211, MCA, to determine whether the Legislature granted appropriate powers to the Department. Based on this recommendation, the Committee requested draft legislation that would limit the Department's authority to enter into tax settlements that involve only disputed or protested taxes. The Committee also requested draft legislation that would clarify the tax rate (mill levy) applied to rail car companies.

MACo Sales Tax Proposal...Gordon Morris, Executive Director, Montana Association of Counties (MACo), presented a tax reform proposal sponsored by MACo. The proposal includes a 4% sales tax on most goods and services sold at retail. Revenue generated from the sales tax would be used to fund K through 12 education and the University System. The proposal also includes substantial property tax relief. The essential elements of the proposal are:

- the taxation of all property at 100% of market value;

- the exemption from taxation of 65% of the first $50,000 or less of the market value of a single-family residence;
- the elimination of personal property taxes, including taxes on livestock;
- the elimination of the 40-mill statewide levy for schools, county equalization levies, school retirement and transportation levies, and the 6-mill University System levy. Other school levies may be reduced or eliminated.
- sales tax rebates for low-income individuals.

The proposal would also do away with the personal property tax reimbursement to local governments and schools. The reimbursements compensate local taxing jurisdictions for the loss in revenue associated with previously enacted reductions in class eight personal property tax rates. The reimbursements are currently scheduled to be phased out by 2008. The proposal also calls for an increase in the electric generation tax and the telephone company license tax. According to MACO estimates, the proposal would generate $496 million for the state, while providing tax relief by the same amount. MACO anticipates that property tax relief for individuals and businesses would be $471 million and that sales tax rebates for low-income individuals would be $25 million. A bill draft request to implement the proposal has been submitted to the Legislative Services Division.

Other Committee Business...The Committee began a review of tax policy as it relates to the taxation of utility services, including electricity, natural gas, and telecommunications. Representatives from investor-owned utilities and rural cooperatives provided insights to the changing market environment. Technological innovations, changes in market structure, and other revisions to public policy have led to the potential of increased competition in these industries. The taxation of utilities has received much national attention. The National Conference of State Legislatures will explore state tax policy relating to telecommunications deregulation and electric utility restructuring at a fiscal analysts' seminar later this month in Portland, OR.

Mick Robinson, Director, Department of Revenue, described the discussions with the Fort Peck Tribes for a negotiated tax agreement for oil and gas production occurring on the reservation. The recently concluded tax agreement with the Blackfeet Tribe may serve as the model for an agreement with the Fort Peck Tribes.

The Committee requested draft legislation to correct an overallocation of the metal mines tax.

Committee to Meet in August...The Committee will meet August 26 in Room 104 of the Capitol. Agenda items will include motor vehicle taxation, a review of draft legislation, a beneficial use tax on ski areas, and a report from the Montana Coal Board.

THE BACK PAGE

On March 27, 1996, the U.S. Supreme Court issued a 5 to 4 decision in the case of *Seminole Tribe of Florida v. Florida, et al.* The case involved the Indian Gaming Regulatory Act (IGRA) and whether or not a state could be sued to force the negotiation of a gaming compact. The decision had been eagerly awaited by both Indian tribes and states. The tribes hoped that a decision in their favor would remove a major roadblock to the expansion of gambling onto Indian reservations, while the states hoped for an affirmation of their 11th amendment rights.

This month's "The Back Page" discusses the *Seminole* decision and its implications for Indian tribes and for states. The decision dropped a large rock into a pond, and the ripples are just beginning to reach the shore.

THE NEW FEDERALISM: CHAPTER ONE

by Connie Erickson, Research Analyst
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THE COURT TAKES CHARGE

The ascendancy of the Republican Party in the 1992 national elections encouraged devolutionists who believed that the time had come for the federal government to empower states. As these devolutionists watched Congress with bated breath, another branch of government was quietly going about implementing the New Federalism. In two recent decisions, the United States Supreme Court has begun the devolution supported by the new Republican congressional majority. In *United States v. Lopez*, the Supreme Court ruled that Congress could not use Article I, section 8, clause 3, commonly referred to as the Commerce Clause, to regulate gun possession on local school grounds. For many years, Congress had relied on the Commerce Clause to regulate all manner of activities in the states. *Lopez* weakened that ability but, in actuality, did very little harm because, in addition to the Commerce Clause, Congress has used other weapons to coerce states into enforcing federal laws. "Do-it-or-lose-it" federalism withholds federal financial aid from those states that refuse to comply with federal laws. One of the more notable examples in recent times was the imposition of the 65-mile-per-hour speed limit. A second weapon was the insertion in federal laws of language authorizing private lawsuits against states that do not do what Congress demands. It is this latter weapon in Congress's arsenal that is in the process of being

dismantled. And the dismantling tool appears to be *Seminole Tribe of Florida v. State of Florida, et al.*

Seminole v. Florida was an Indian gaming case brought by the Seminole Tribe of Florida against the State of Florida and its Governor, Lawton Chiles. Under the Indian Gaming Regulatory Act (IGRA), an Indian tribe can request the state in which the tribe is located to enter into negotiations for the purpose of concluding a compact for the operation of certain types of gaming, namely casino games, on the Indian reservation. If requested, the state must enter into the negotiations. If the state fails to respond to the request or fails to negotiate in good faith, Congress authorized the tribe to bring a cause of action in federal District Court. If the court finds for the tribe, the court shall order the state and the tribe to conclude a compact within 60 days. If that fails, the state and the tribe must each submit its last best offer for a compact to a court-appointed mediator. The mediator shall select one of the compacts. If the state does not accept the mediator's choice, the Secretary of Interior will prescribe a compact.

In 1991, the Seminole Tribe of Florida entered into negotiations with the State of Florida for a gaming compact. The state agreed to negotiate on certain types of gaming activities but refused to negotiate any form of casino gaming. The Seminole Tribe filed suit in the United States District Court for the Southern District of Florida. The state moved for dismissal, claiming sovereign immunity from suit under the 11th amendment to the U.S. Constitution:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The District Court ruled against the state by saying that Congress, by enacting IGRA, had abrogated the states' 11th amendment immunity. Upon appeal to the 11th Circuit Court of Appeals, the District Court's decision was reversed. The Tribe then appealed to the U.S. Supreme Court.

On March 27, 1996, the Supreme Court, in a 5 to 4 decision, upheld the 11th Circuit Court decision by holding that the 11th amendment prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause of the U.S. Constitution (Article I, section 8, clause 3). The court also held that the doctrine of *Ex parte Young* may not be used to enforce IGRA's compacting provisions against a state official. (The *Ex parte Young* doctrine came from a 1908 Supreme Court case that held that a state official who violates federal law is not immune from suit under the 11th

amendment, even if acting in an official capacity.)

WHITHER IGRA?

The reaction to *Seminole* in state capitals and in Indian country has been mixed. On the surface, it appears that the decision gives states the upper hand in gaming negotiations while dealing tribes a knockout punch. However, upon closer examination, black and white melts into gray. IGRA states that if all remedial steps have been taken and have failed, the Secretary of Interior shall prescribe the regulations covering Class III gaming (basically casino gaming) on a tribe's reservation. The 11th Circuit Court decision upheld this part of IGRA, and the Supreme Court neither upheld nor rejected it. Therefore, it would appear, at least in southern states, that if a state pleads an 11th amendment immunity, a tribe can go directly to the Secretary of Interior, leaving the state completely out of the loop.

The waters become even murkier when decisions in the Ninth Circuit Court of Appeals, to which Montana belongs, are examined. In *Spokane Tribe v. Washington State*, the Ninth Circuit Court ruled that the state could be sued without its consent; in other words, the 11th amendment sovereign immunity did not apply. Although this case will have to be redecided in light of *Seminole*, the justices in the Ninth Circuit Court did not read the remedial provisions in IGRA in the same manner as did the 11th Circuit Court justices:

> The Eleventh Circuit's solution would turn the Secretary of Interior into a federal czar, contrary to the congressional aim of state participation.

It is highly unlikely that the Ninth Circuit Court will change its mind on allowing the tribes to go directly to the Secretary of Interior. Therefore, tribes in the western part of the United States are left with no remedy if a state claims immunity from suit.

Two Indian tribes in Montana--the Blackfeet and the Fort Belknap--filed suits against the state for failure to negotiate in good faith. The federal District Court ruled in favor of the state in both cases. The decisions were reversed on appeal by the Ninth Circuit Court, but as a result of *Seminole*, both cases have been remanded to federal District Court with instructions to dismiss.

In light of the *Seminole* decision, it is almost certain that Congress will act to amend IGRA. What those amendments will be are still the subject of speculation, but Indian tribes fear that the amendments will swing the balance of power toward the states. It is inconceivable that either

Congress or the President will approve amendments that force tribal gaming on unwilling states. Nelson Rose, a law professor at Whittier Law School and an authority on gambling and the law, believes that Congress will act to amend IGRA by limiting the tribes to exactly the same games allowed by state law. If this happens, it could severely curtail casino gambling on Indian lands.

FEDERALISM *SEMINOLE* STYLE

While the *Seminole* decision rose out of a case dealing with Indian gaming, the decision's implications go far beyond the bounds of an Indian reservation. In deciding *Seminole*, the Supreme Court asked, "Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause?" In answering the question, the court looked at two provisions of the constitution that the court had found in previous decisions to authorize congressional abrogation of the states' immunity from suit: the 14th amendment (*Fitzpatrick v. Bitzer*) and the Interstate Commerce Clause (*Pennsylvania v. Union Gas Co.*), which is the same clause as the Indian Commerce Clause. In deciding *Seminole*, the court reaffirmed Congress's power to abrogate states' immunity under the 14th amendment. However, at the same time and with a bold stroke of the pen, the court overturned *Union Gas*. Congress no longer has the authority to allow private lawsuits against states to enforce legislation passed pursuant to Article I, section 8, clause 3 of the U.S. Constitution.

In his dissent to *Seminole*, Justice Stevens predicted that the decision would have ramifications far beyond an Indian tribe's ability to seek a federal court's assistance in securing good faith negotiations from a state over gaming regulations:

> The majority's opinion . . . prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.

Montana has already tested the waters by invoking the *Seminole* decision in a case involving the Railroad Revitalization and Regulatory Reform Act (4-R Act). Section 306 of the 4-R Act specifies that states may not assess railroad properties at a rate that exceeds the rates for other commercial and industrial properties. Section 306 also gives the federal courts jurisdiction over any disputes that may arise as a result of the 4-R Act. *Seminole* calls into question the ability of a railroad to sue a state that enacts a discriminatory assessment or gives an exemption to other properties but not to railroads. In 1992, Montana revised the laws

relating to the taxation of rail cars and was promptly sued by eight rail car companies, claiming that the tax violated the 4-R Act. On March 13, 1996, the companies and the Department of Revenue announced a settlement that established a new method of calculating the tax, gave the state $6 million of the contested taxes, and returned $8.5 million plus interest to the companies. The deadline for signing the settlement was April 29. Two weeks later after the announcement of the settlement, the Supreme Court issued its decision in *Seminole*. On April 23, the state asked the Ninth Circuit Court of Appeals to dismiss the case for lack of jurisdiction based on *Seminole*. The rail car companies responded by adding Revenue Department Director Mick Robinson as a defendant in accordance with the *Ex parte Young* doctrine. On May 25, Judge Jack Shanstrom, federal District Court for Montana, denied the motion to dismiss, claiming that the state had waived its immunity by agreeing to enter into the original settlement. At the same time, the rail car companies withdrew their amendment naming Robinson as a defendant. Apparently the companies felt that, in light of the denial of the state's motion to dismiss, it was no longer necessary to name Robinson in an attempt to ensure that the federal court would have jurisdiction in the case.

Professor Walter Hellerstein of the University of Georgia acknowledges the importance of the *Seminole* decision but questions whether the decision signals the end of the 4-R Act. He believes that a suit could be brought by a railroad against a political subdivision of a state because it may not have the same protection afforded by the 11th amendment. Although the Supreme Court found the *Ex parte Young* doctrine inapplicable in *Seminole* because of the detailed remedial scheme contained in IGRA, Hellerstein believes that *Seminole* does not necessarily preclude a railroad from bringing an *Ex parte Young* action.

In a recent case involving the State of Kansas, the U.S. District Court for the State of Kansas dismissed for lack of jurisdiction a Fair Labor Standards Act (FLSA) suit brought by state employees against their employer (*Adams v. Kansas*). In reaching its decision, the District Court applied *Seminole*, stating that Congress does not have the authority under the FLSA to abrogate the states' 11th amendment immunity because the FLSA was enacted pursuant to the Interstate Commerce Clause. If the state employees try to bring suit in state court, it is highly likely that the state court will dismiss for lack of jurisdiction, leaving Kansas state employees with no remedy.

Although states may think that they have something to cheer about with the *Seminole* ruling, they should wait before holding their victory celebrations. Congress delegated a great deal of power to the states in IGRA by allowing the states to negotiate gaming compacts. In retaliation for states failing to negotiate, then hiding behind the 11th amendment,

Congress could remove the states from the compacting process altogether. In another scenario, if private citizens and environmental groups are barred from taking the states to court to enforce federal environmental regulations, the momentum for enforcing those regulations could shift back to Washington, D.C., where congressional environmentalists will be reluctant to pass any power to the states for maintaining the quality of their air and water.

WHITHER FEDERALISM?

What, then, does *Seminole* hold for the future of the balance of power in the American governmental system? Only time will tell what effect *Seminole* will have on Indian gaming or on other federal laws for that matter. The *Seminole* decision will certainly raise red flags in any lawsuit brought against a state. Congress will most likely act to resolve the logjam that now exists in the gaming compacting process in many states. The Montana Department of Revenue is still discussing an appeal of Judge Shanstrom's motion to dismiss in the rail car tax case. *Adams v. Kansas* may be appealed to the 10th Circuit Court. Stay tuned for Chapter Two of the New Federalism, *Seminole* style.

INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL.

AUGUST

August 6, Subcommittee on Veterans' Needs, Room 104, 9 a.m.

August 14 and 15, Committee on Public Employee Retirement Systems, Room 104, 8 a.m.

August 16, LFC Subcommittee on SB 378, Room 108, 8 a.m.

August 23, Committee on State Management Systems, Room 104, 9 a.m.

August 26, Revenue Oversight Committee, Room 104

August 27, Montana Sentencing Commission Subcommittee on Intermediate Sanctions, Women's Correctional Center, Billings, 10 a.m.

August 27 and 28, Gaming Advisory Council, Room 325, 9 a.m.

SEPTEMBER

September 2, Labor Day, holiday

September 9, Postsecondary Education Policy and Budget Committee, Room 104, 9 a.m.

September 9 and 10, Juvenile Justice and Mental Health Study Commission, Room 437

September 11 and 12, Subcommittee on the Foreign Investment Depository, Room 437

September 12 and 13, Legislative Council, Room 104

September 13, Committee on Indian Affairs, Room 108

September 16, Committee on Children and Families, Room 437, 8 a.m.

September 18, LFC Subcommittee on Resource Indemnity Trust, Room 104, 9 a.m.

September 19, Joint Legislative Finance Committee/Revenue Oversight Committee, Room 325, 9 a.m.

September 19, Legislative Finance Committee, Room 104, 1 p.m.

September 20, Legislative Finance Committee, Room 104, 8 a.m.

OCTOBER

October 7, Postsecondary Education Policy and Budget Committee, Room 104, 8 a.m.

October 14, Columbus Day observed, holiday

360 copies of this public document were published at an estimated cost of 55¢ per copy, for a total cost of $198.00, which includes $142.00 for printing and $56.00 for distribution.

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